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No. 79-488

IN THE

Supreme Court of the United States

October Term, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Summary	4
Argument	6
1. The EEOC Is Bound by the Federal Rules of Civil Procedure as Is Any Other Litigant	6
2. Congress Does Have the Power to Supersede the Federal Rules, But Unless It Clearly Expresses an Intent to Do So, Subsequently Enacted Statutes Must Be Construed to Harmonize With the Federal Rules	8
3. The Legislative History of Title VII	9
4. The Applicability and Desirability of Applying Rule 23 to EEOC Actions	16
5. The Problems In Failing to Require That Rule 23 Apply to EEOC Actions Under § 706	22
6. The Relationship Between § 707 and § 706	28
Conclusion	30

TABLES OF AUTHORITY

Table of Cases

Albemarle Paper Company v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)	17
Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)	17
Arkansas Educ. Assn. v. Board of Educ., 446 F.2d 763 (8th Cir. 1971)	18
Butera v. Mountain States Tel. & Tel. Co., 18 Fair Empl. Prac. Cas. 1779 (D. Colo. 1977)	23
Carter Carburetor v. EEOC, ___ U.S. ___, 99 S. Ct. 865, 59 L. Ed. 2d 52 (1979)	24

Page

Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) 17

Durkin v. Pet Milk Company, 14 F.R.D. 385 (W.D. Ark. 1953) 8

East Texas Motor Freight v. Rodriquez, 431 U.S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) 14, 17, 23

EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978) 9

EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) 23, 27

EEOC v. Bumble Bee Seafoods, 19 Empl. Prac. Dec. ¶ 9160 (D. Ore. 1979) 10

EEOC v. Carter Carburetor, 76 F.R.D. 143 (E.D. Mo. 1977), mandamus issued, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 865 (1979) 9

EEOC v. Continental Oil Co., 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977) 9

EEOC v. CTS, 13 Fair Empl. Prac. Cas. 852 (W.D. N.C. 1976) 10

EEOC v. Datapoint Corp., 12 Fair Empl. Prac. Cas. 1133 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978) 9, 23, 26

EEOC v. Delaware Trust Co., 81 F.R.D. 448, 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979).....9, 23, 26

EEOC v. Hearst Corp., 553 F.2d 579 (9th Cir. 1976).... 22

EEOC v. D. H. Holmes, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).....4, 21, 23, 24, 28, 29

EEOC v. Federal Reserve Bank, 21 Fair Empl. Prac. Cas. 743 (S.D. N.Y. 1979) 9

EEOC v. General Tel. Co., 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977) 10

EEOC v. Lutheran Hosp., 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974) 10

EEOC v. Mid-City Care Center, 20 Empl. Prac. Dec. ¶ 30,275 (W.D. Tenn. 1979) 9

Page

EEOC v. Occidental Life Ins. Co. of Cal., 535 F.2d 533 (9th Cir. 1976) 22

EEOC v. Page Eng'r Co., 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978) 9, 19, 26

EEOC v. Pinkerton's Inc., 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977) 10

EEOC v. Raymond Metal Prods. Co., 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978) 10

EEOC v. Schlueter Mfg. Co., 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978) 10

EEOC v. Singer Controls Co. of America, 18 Fair Empl. Prac. Cas. 309 (N.D. Ohio 1978)..... 10

EEOC v. Stroh Brewery, 19 Empl. Prac. Dec. ¶ 9226, 19 Fair Empl. Prac. Cas. 1099 (E.D. Mich. 1979)..... 10

EEOC v. Vinnell-Dravo-Lockheed-Manning, 417 F. Supp. 575 (E.D. Wash. 1976)..... 10

EEOC v. Westinghouse Electric Corp., 20 Fair Empl. Prac. Cas. 120 (M.D. N.C. 1979)..... 9

EEOC v. Whirlpool Corp., 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978) 10

Franklin v. General Electric Co., 15 Fair Empl. Prac. Cas. 1085 (W.D. Va. 1975)..... 27

Franks v. Bowman, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 44 (1976)..... 27

Garnett v. Mountain States Tel. & Tel. Co., 18 Fair Empl. Prac. Cas. 1773 (D. Colo. 1978)..... 23

Harris v. Anaconda Aluminum Co., 16 Empl. Prac. Dec. ¶ 8265 (N.D. Ga. 1978) 9

Hunt v. Washington State Apple Advertising Comm., 423 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).. 18

In re General Motors Corporation Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979)..... 8

Int'l Woodworkers v. Georgia-Pacific Corp., 568 F.2d 64 (8th Cir. 1977)..... 18

LaCombe v. Mountain States Tel. & Tel. Co., 18 Fair Empl. Prac. Cas. 1774 (D. Colo. 1977)..... 23

	Page
Local 194 v. Standard Brands, 74 C 0587 (N.D. Ill., December 6, 1979)	9
Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958)	8
Niedhardt v. D. H. Holmes Co., 13 Fair Empl. Prac. Cas. 449 (E.D. La. 1976), *aff'd*, *EEOC v. D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978)	9, 11, 13, 17, 19
Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968)	18
Oatis v. Crown Zellerbach Co., 398 F.2d 496 (5th Cir. 1968)	14
Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977)	17, 18
Peals v. Southwestern Bell Tel. Co., 18 Fair Empl. Prac. Cas. 1781 (D. Kan. 1977)	23
Pearson v. Townsend, 326 F. Supp. 202 (D. S.C. 1973)	25
Roman v. ESB Inc., 550 F.2d 1343 (4th Cir. 1976)	23
Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)	8
Smith v. Board of Education, 365 F.2d 770 (8th Cir. 1966)	18
Social Services Union v. County, ___ F.2d ___, 21 Fair Empl. Prac. Cas. 684, (9th Cir. 1979)	18, 19
Sperando v. Milk Drivers Employees Local Union #537, 334 F.2d 381 (10th Cir. 1964)	7-8
Stuart v. Hewlett-Packard Co., 66 F.R.D. 73 (E.D. Mich. 1975)	10, 27
Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)	21, 28, 29
Thompson v. Board of Educ., 71 F.R.D. 398 (W.D. Mich. 1976)	18
United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)	23
United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942)	7

	Page
United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973)	29
United States v. Gustin-Bacon Div., 426 F.2d 539 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970)	8
United States v. Procter & Gamble, 356 U.S. 677, 78 S. Ct. 983, 21 L. Ed. 1077 (1958)	7
United States v. Welden, 377 U.S. 95, 84 S. Ct. 1082, 12 L. Ed. 2d 152 (1964)	8
Walker v. Southwestern Bell Tel. Co., 18 Fair Empl. Prac. Cas. 1784 (N.D. Tex. 1978)	23
Williamson v. Bethlehem Steel Corporation, 468 F.2d 1201 (2d Cir. 1972), *cert denied*, 411 U.S. 913 (1973)	23

Statutes

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	4
42 U.S.C. § 2000e-5	2, 5, 6, 7 *et seq.*
42 U.S.C. § 2000e-5(f)(5)	3

Other Authority

Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission*, 29 Case W. Res. L. Rev. 343 (1979)	9, 22, 29
Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. Chi. L. Rev. 690 (1979)	9, 18, 29
Developments in the Law—Title VII, 84 Harv. L. Rev. 1109 (1971)	29
2 Moore's Federal Practice ¶ 1.05 (2d ed. 1979)	8
3B Moore's Federal Practice ¶ 23.02[1] (2d ed. 1979)	25
Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69 (1966)	25

Page

Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co.*, 28 Syracuse L. Rev. 741 (1977) 10

Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, (Comm. Print 1972) 12

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BRIEF OF PETITIONERS

OPINIONS BELOW

The June 27, 1979 opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F.2d 322 (9th Cir. 1979). The report and recommendation of the magistrate on November 11, 1977 (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not officially reported, but it is in 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission must comply with the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure when it brings suit on behalf of a class under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 706 of Title VII, Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. §2000e-5 (Pet. App. A-34 to A-40).

See also, Rule 23 of the Federal Rules of Civil Procedure (Pet. App. A-41 to A-43).

STATEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) filed suit in United States District Court, Western District of Washington, on April 11, 1977 against defendants General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter referred to collectively as GTNW), and defendant Local Union No. 89, International Brotherhood of Electrical Workers (A. 2-6). The complaint stated that the action was "authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* (Supp. II, 1972)" (A. 2). The complaint was precipitated by charges filed with the EEOC under Section 706 by four female employees of GTNW. 599 F.2d at 325 n. 1 (Pet. App. A-7 n. 1) (R. 24 & 27). The Commission, however, did not limit the relief it sought to the four charging parties. Instead the complaint, as amended on August 1,

1977, alleged that GTNW discriminated against women throughout the company with regard to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions (A. 7-11). The complaint sought broad relief, including "appropriate back pay", for all "persons adversely affected by the unlawful employment practices" alleged in the amended complaint (A. 11).

The EEOC did not allege in the original complaint or in the amended complaint that this was a class action under Rule 23 of the Federal Rules of Civil Procedure (A. 1-11). Furthermore, no action was taken to have the case certified as a class action in accordance with Rule 23. On August 15, 1977, however, the EEOC moved "the Court for an order bifurcating the issue of *class* liability from the issue of individual damages pursuant to Rule 42(b), Fed. R. Civ. Proc." (emphasis added) (A. 12). In support of its motion the EEOC filed a memorandum of authorities in which it characterized the complaint as alleging "Company-wide patterns and practices of class discrimination and [seeking] back pay and other individual relief for a very large number of affected class-members", which it estimated were "in excess of 2,000 persons . . . scattered over five states—Washington, Oregon, Idaho, Montana and California" (A. 14). Throughout its memorandum the EEOC continued to refer to this action as a "pattern and practice action" and a "class action" (A. 14-19). Also on August 15, 1977, pursuant to §706(f)(5) of Title VII, 42 U.S.C. §2000e-5(f)(5), the court ordered the action referred to a United States magistrate (A. 22-23).

On September 16, 1977 GTNW filed a motion to dismiss the class action aspects of the EEOC's complaint (A. 24-25). The magistrate issued a Report and Recommendation

on November 11, 1977 (Pet. App. A-25 to A-32) in which he concluded that the EEOC did not have to comply with Rule 23, rejecting the opposite conclusion of the Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). On December 21, 1977 the district court approved and adopted the report and recommendation of the magistrate (Pet. App. A-33). GTNW moved for reconsideration and requested that it be permitted to file an interlocutory appeal on the Rule 23 issue pursuant to 28 U.S.C. §1292-(b) (A. 26-27). The district court amended its earlier order on January 17, 1978 and certified it for an immediate interlocutory appeal (A. 28-29). The Court of Appeals for the Ninth Circuit granted the petition for permission to appeal on April 4, 1978 (A. 30).

The court of appeals, on June 27, 1979, through the district court judge sitting by designation, affirmed the district court conclusion that the EEOC did not have to comply with Rule 23 (Pet. App. A-1 to A-24). GTNW petitioned for a writ of certiorari on September 22, 1979, which this Court granted December 10, 1979.

SUMMARY

The Federal Rules of Civil Procedure apply to all suits in federal court, including those by the EEOC, unless exempted by Rule 81, and it does not contain an exemption for the EEOC.

While Congress can supersede the federal rules, its intent to do so must be clear. The legislative history on the 1972 amendments to Title VII (which gave the EEOC authority to proceed under §706) suggests, however, that the EEOC was granted court-enforcement authority only with the clear understanding it would be bound by the

federal rules. Further, the EEOC was given specific standing to be a "properly suing" party under Rule 23 under these amendments. Congress knew how to make exemptions from the federal rules and did so during the 1972 amendments for magistrate referrals under Rule 53, but it did not exempt EEOC class actions from Rule 23.

The EEOC can comply with the class certification requirements of Rule 23 and it is desirable that it do so. Congress has authorized the EEOC to be a member of the class and to sue on its behalf, it would be an excellent representative with its resources and expertise, and any conflicts between it and the class are likely to be no greater than in any other class action. It seeks much the same relief as would the individual charging parties if they had sued directly, which also would be in the public interest, and they would be required to comply with Rule 23; so should the EEOC.

The court of appeals suggested the problems created by failing to apply Rule 23 could be obviated by reliance upon the court's equitable powers under §706(g). This approach should be rejected as the purpose of §706(g) was to permit the fashioning of substantive relief to make whole aggrieved individuals—not to circumvent a long-established procedural rule. Use of §706(g) in this respect would signal a return to pre-1966 actions and, undesirably, would require each court to make individual decisions case-by-case, which was the course of treatment Rule 23 was designed to eliminate.

There are numerous policy reasons why Rule 23 should apply to EEOC actions under §706: binding effect upon the class members of a decision or settlement, thereby avoiding subsequent and multiple litigation; early defini-

tion as to the size and scope of the class; identity of adverse interests; better judicial control of the action and settlement; procedural fairness to defendant employers (if they will be bound to the class if they lose, the class should be controlled by the decision if the employer prevails); potential protection of class members who may be relying upon the EEOC, only to discover it has decided not to seek relief for them; and protection against abuse of class actions.

The failure to require the Attorney General to comply with Rule 23 for pattern or practice actions under §707 prior to the 1972 amendments to Title VII is inconclusive authority for not requiring the EEOC to so comply under §706. This is because the issue of Rule 23 applicability was never raised as to §707 actions by the Attorney General, and he primarily sought injunctive relief. It was not until the Fifth Circuit in 1973 authorized back pay under §707 that the issue of Rule 23 took on added importance.

The general applicability of the federal rules, the legislative history to the 1972 amendments, and strong policy reasons compel a conclusion that the EEOC should be held responsible for complying with the class certification requirements of Rule 23.

ARGUMENT

1. The EEOC Is Bound By the Federal Rules of Civil Procedure as Is Any Other Litigant

The Ninth Circuit recognized that:

> Rule 1 of the Federal Rules of Civil Procedure states that the federal rules "govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81."

599 F.2d at 327 (Pet. App. A-10).

The court of appeals went on to note that Rule 81 did "not contain an exemption for suits brought by the EEOC

under Title VII." *Id.* n. 5. But then the court appeared to conclude, contrary to its earlier concurrence as to the applicability of the federal rules to Title VII suits, that because Rule 23 did not state it applied to "actions brought by the EEOC to enforce Title VII rights," the EEOC did not have to comply with Rule 23. 599 F.2d at 328, 333 (Pet. App. A-11, A-21). GTNW contends the court of appeals erred in this regard in which it apparently, and improperly, shifted the burden of proof on exemption from the federal rules in general, and Rule 23 in particular, from the party seeking the exemption (the EEOC) to GTNW, which was required to demonstrate with specificity that Rule 23 applied.

This Court has impliedly confirmed that the Federal Rules of Civil Procedure apply to actions by the government. *United States v. Procter & Gamble,* 356 U.S. 677, 681, 78 S. Ct. 983, 21 L.Ed 1077 (1958). This general principle is uniformly accepted by the lower courts and commentators.[1] Since the EEOC is not specifically exempt from Rule 23 under this analysis, we turn to the question of whether there is some other basis for its exemption.

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1. In *United States v. General Motors Corp.*, 2 F.R.D. 528 (N.D. Ill. 1942), the court rejected the government's claim that it was not bound by Fed. R. Civ. P. 33 because the rule did not specifically mention the United States.

> But, counsel contends, it appears from the rule itself that it was not intended to apply to the United States because the United States is not mentioned in the rule, citing in support thereof 1 Blackstone's Commentaries, 261 . . . .
>
> • • • •
>
> And that the rules generally apply to the United States is shown by the provisions of Rule 12 extending the time in which the United States may plead.
>
> To hold that the rules do not apply to the United States except where it is particularly mentioned would lead to absurd results. Then there would be no rule in such cases as to many matters of procedure.

2 F.R.D. at 529-30.

Accord, Sperando v. Milk Drivers & Dairy Employees Local Union

[Footnote 1 continued on next page.]

2. Congress Does Have the Power to Supersede the Federal Rules, But Unless It Clearly Expresses an Intent to Do So, Subsequently Enacted Statutes Must Be Construed to Harmonize With the Federal Rules

While this Court has not specifically ruled upon the issue, it is an accepted principle in the lower courts that, while Congress may statutorily supersede any or all of the Federal Rules of Civil Procedure, its intent to do so must clearly appear or the subsequently enacted statute will be construed to harmonize with the Rules.[2]

This Court has held, in an analogous area, when discussing the effect of a later Congressional enactment upon prior legislation, that amendments by implication are not favored. *United States v. Welden,* 377 U.S. 95, 84 S. Ct. 1082, 12 L. Ed. 2d 152 (1964); *Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). GTNW contends that the Court should keep this principle in mind in reviewing the history of the 1972 Amendments to Title VII as even the Ninth Circuit con-

#537, 334 F.2d 381, 384 (10th Cir. 1964); *Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1958); *Durkin v. Pet Milk Company,* 14 F.R.D. 385, 390 (W.D. Ark. 1953); *Walling v. Richmond Screw Anchor Co.,* 4 F.R.D. 265, 269 (E.D. N.Y. 1943); and 2 Moore's Federal Practice ¶1.05, at 241-42 (2d ed. 1979). If this were not the case, we would have a situation where the government could selectively pick and choose those federal rules by which it would be bound, which is what GTNW contends the EEOC is attempting to do.

The United States as a party is specifically referenced only in some of the Federal Rules of Civil Procedure. Do the remaining rules not apply to actions in which the United States is a party? The very question suggests a contrary answer.

2. *United States v. Gustin-Bacon Div.,* 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied,* 400 U.S. 832 (1970). This case also involved the 1964 Civil Rights Act, although prior to the 1972 amendments. The Tenth Circuit did conclude that the federal rules applied to litigation under the Civil Rights Act. *See also In re General Motors Corporation Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), in which it was argued that Rule 23(a) was not applicable to class actions maintained under the Magnuson-Moss Act, a position which the Seventh Circuit rejected at 1134-35 n. 50.

cluded that the "legislative history likewise fails to express clearly an intention that the EEOC comply with or be exempted from the class action certification requirement." *General Telephone, supra,* 599 F.2d at 328 (Pet. App. A-12). As a consequence, these general principles of construction require a conclusion that the EEOC is bound by Rule 23 as is any other litigant.

3. The Legislative History of Title VII

We must review the legislative history of Title VII in an attempt to determine the intent of Congress because the lower courts, and the commentators, have split in their respective views as to whether the history suggests an intent that Rule 23 apply to §706 actions by the EEOC.[3]

3. District court decisions in which Rule 23 has been held to apply to §706 actions by the EEOC include: *Local 194 v. Standard Brands,* 74 C 0587, Slip Op. at 15-21 (N.D. Ill., December 6, 1979); *EEOC v. Westinghouse Electric Corp.,* 20 Fair Empl. Prac. Cas. 120 (M.D. N.C. 1979); *EEOC v. Delaware Trust Co.,* 81 F.R.D. 448, 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979); *Harris v. Anaconda Aluminum Co.,* 16 Empl. Prac. Dec. ¶8265 (N.D. Ga. 1978); *EEOC v. Page Eng'r Co.,* 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978); *Niedhardt v. D. H. Holmes Co.,* 13 Fair Empl. Prac. Cas. 449 (E.D. La. 1976), *aff'd, EEOC v. D. H. Holmes Co.,* 556 F.2d 787 (5th Cir. 1977), *cert. denied,* 436 U.S. 962 (1978); and *EEOC v. Continental Oil Co.,* 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds,* 548 F.2d 884 (10th Cir. 1977). *See also EEOC v. Datapoint Corp.,* 12 Fair Empl. Prac. Cas. 1133 (W.D. Tex. 1975), *aff'd in part,* 570 F.2d 1264 (5th Cir. 1978); *EEOC v. Akron Nat'l Bank & Trust Co.,* 78 F.R.D. 684 (N.D. Ohio 1978); and *EEOC v. Carter Carburetor,* 76 F.R.D. 143 (E.D. Mo. 1977), mandamus issued, 577 F.2d 43 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 865 (1979).

This position that Rule 23 applies to EEOC §706 action is supported by Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979), and Comment, *Certification of EEOC Class Suits Under Rule 23,* 46 U. Chi. L. Rev. 690 (1979).

District court decisions in which Rule 23 has been held not to apply to §706 actions by the EEOC include: *EEOC v. Federal Reserve Bank,* 21 Fair Empl. Prac. Cas. 742 (W.D. Tenn. 1979); *EEOC v. Mid-City Care Center,* 20 Empl. Prac. Dec. ¶30,275 (W.D. Tenn. 1979); *EEOC*

[Footnote 3 continued on next page.]

Title VII of the Civil Rights Act of 1964[4] created an individual cause of action for certain types of discrimination but did not permit the EEOC to initiate its own actions.[5] The EEOC's powers were restricted to investigation of charges, making findings related thereto, and seeking voluntary elimination of unlawful employment practices.[6] Under §706 of Title VII the charging party could sue in district court if the EEOC was unable to conciliate the charge,[7] and under §707 the Attorney General was authorized to bring suit in district court if he had "reasonable cause" to believe there was a "pattern or practice" of discrimination.[8]

In 1972 Congress amended Title VII by the Equal Employment Opportunity Act of 1972.[9] The result was that the EEOC was permitted to file actions in federal district court

v. Bumble Bee Seafoods, 19 Empl. Prac. Dec. ¶9160 (D. Ore. 1979); *EEOC v. Stroh Brewery*, 19 Empl. Prac. Dec. ¶9226, 19 Fair Empl. Prac. Cas. 1099 (E.D. Mich. 1979); *EEOC v. Singer Controls Co. of America*, 18 Fair Empl. Prac. Cas. 309 (N.D. Ohio 1978); *EEOC v. Raymond Metal Prods. Co.*, 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978); *EEOC v. Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977); *EEOC v. Pinkerton's Inc.*, 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977); *EEOC v. CTS*, 13 Fair Empl. Prac. Cas. 852 (W.D. N.C 1976); *EEOC v. Vinnell-Dravo-Lockheed-Manning*, 417 F. Supp. 575 (E.D. Wash. 1976); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73 (E.D. Mich. 1975); and *EEOC v. Lutheran Hosp.*, 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974).

One commentator concurs that the EEOC should not be required to comply with Rule 23. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co.*, 28 Syracuse L. Rev. 741 (1977).

4. Pub. L. 88-352, §§701-716, 78 Stat. 253 (present version at 42 U.S.C. §2000e et. seq.).

5. *Id.* §706(e), 78 Stat. 260.

6. *Id.* §706(e), 78 Stat. 259.

7. *Id.* §706(e), 78 Stat. 260.

8. *Id.* §707(a), 78 Stat. 261.

9. Pub. L. 92-261, 86 Stat. 103, Equal Employment Opportunity Act of 1972 (EEOA).

under §706 based upon individual charges filed with it by aggrieved persons.[10] The 1972 amendments also transferred the Attorney General's pattern or practice authority under §707 to the EEOC.[11]

Upon obtaining the authority to file direct actions in 1972, the EEOC has aggressively initiated §706 actions against private employers, as the case before this Court aptly illustrates. These various private empoyers, as defendants, have raised the question of whether the EEOC should be required to comply with Rule 23.[12]

Since the *Holmes* decision, at least three commentators have reviewed in depth the Congressional history of the 1972 amendments to Title VII.[13] The consensus of opinion, as was recognized by the Fifth Circuit in *Holmes, supra,* 556 F.2d at 794, and *General Telephone, supra,* 599 F.2d at 328 (Pet. App. A-12), is that there is no clear exclusion for the EEOC from Rule 23 in either the legislative history or in the language of Title VII.

During the Congressional debate on the 1972 Title VII amendments, there were two distinct proposals with regard to changing the enforcement powers of the EEOC. One proposal would have given the EEOC enforcement power by permitting it to issue administrative cease-and-desist

10. Section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1) (1976). See Pet. App. at A-34 to A-40 for a complete re-print of §706, 42 U.S.C. §2000e-5.

11. Section 707(e) states:

> Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of the person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EEOC, §5, 42 U.S.C. §2000e-6(e) (1976).

12. See note 3 *supra* and cases cited therein.

13. *Id.*, Bumpass, Comment and Reiter.

orders; the second proposal permitted it to sue directly in federal district court.[14]

The advocates of the court-enforcement approach, which ultimately was accepted, urged that it was necessary to ensure "due process", a "fair trial," and in general a fair hearing for employers, due to the perceived Commission bias in favor of charging parties.[15]

> It stands to reason that the congressmen who expressed such sentiments contemplated the existing judicial "machinery" or "system" which was ultimately adopted by Congress as an enforcement mechanism would include the application of established and customarily applied rules of civil procedure.

Bumpass, *supra* note 3, at 351-52.

During the Senate debate, Senator Dominick proposed the amendment which was finally adopted by the Senate. In its support he argued:

> Additionally, you can do far better in a court proceeding which is impartial, organized, and ruled by precedent and *established rules of procedure* than you can from an administrative proceeding composed of a group of people who are largely responsible to no one except the person who appointed them—largely in the executive department—or who may have been appointed as part of the staff of the agency itself.

EEOA Legislative History, *supra* note 14, at 1557 (emphasis added).

After Senator Dominick's amendment was adopted by the Senate, further comments were made by Senator Ervin, which also assist in ascertaining Congressional intent:

14. See, e.g., Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 118, 248, 279, 589, 645, 690 (Comm. Print 1972) [hereinafter cited as EEOA Legislative History].

15. *Id.* at 119, 682, 690, 695, 696, 698, 779, 782, 797, 806-810, 837, 838, 991, 992, 1027, 1110, 1270-81, 1290, 1314, 1347, 1418, 1443, 1467, 1533, 1546, 1694.

> As a result of about five separate rollcall votes and many days of debate . . . we adopted the Dominick amendment, which frees Americans involved in controversies with the EEOC from having the EEOC be the prosecutor, the judge, and I might add the executioner. Now they are assured of being able to get a hearing *according to the rules of procedure* and evidence by which the rights of all other persons are judged in courts of our land, and before impartial judges rather than biased crusaders.

Id. at 1661 (emphasis added).

The Fifth Circuit in *Holmes*, in concluding that the EEOC was required to comply with Rule 23 (and the other courts which have similarly ruled), attached particular significance to subsequent comments by Senator Javits. *Holmes, supra*, 556 F.2d at 794 n. 11. GTNW contends the Fifth Circuit correctly concluded that Senator Javits' comments clearly expressed the intent that Congress did not mean to exempt §706 actions brought by the EEOC from the application of Rule 23. Senator Javits was arguing as to why the Attorney General's authority to bring §707 pattern or practice suit should be transferred to the EEOC, since it would be permitted to bring class actions under §706 per Rule 23 and therefore should have §707 responsibilities too. He explained:

> One other point which it seems to me is absolutely decisive is that the EEOC, under the Dominick amendment, has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice. These are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants.
>
> It seems to me that this is provided for by the rules of civil procedure in the Federal courts, and also it is inherent in the amendment which we adopted. Under those circumstances it seems to me that this amendment is conclusively dealt with, and whatever may have been the argument which might have ob-

> tained in respect of cease-and-desist orders and the desire to retain this jurisdiction in the Department of Justice when the Commission was going to proceed by cease-and-desist order rather than suit, has now given way to the fact that the Commission can only proceed by suit. And if it proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

Id. at 589-90; 118 Cong. Rec. 4081-82 (1972).

While the EEOC has argued that the legislative history is scant and ambiguous, one thing which is apparent is that there is *no* specific reference in the legislative history which suggests directly or impliedly that Rule 23 would *not* apply to §706 actions brought by the EEOC. In addition, the Section-by-Section Analysis prepared by Senator Williams did state that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."[16]

There were no §707 cases prior to March, 1972 where the issue of the applicability of Rule 23 had ever been raised. At that time, however, individual plaintiffs instituting class actions suits under §706 were required to comply with Rule 23. *See, e.g., East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405, 97 S. Ct. 1891, 1898, 52 L. Ed. 2d 453 (1977); *Oatis v. Crown Zellerbach Co.*, 398 F.2d 496 (5th Cir. 1968). GTNW contends that the Ninth Circuit,

16. EEOA Legislative History, *supra* note 14, at 1844.

in reviewing this legislative history, mistakenly required direct and positive evidence that Rule 23 applied to §706 actions by the EEOC, i.e., the burden was upon GTNW, when the proper analysis should have been to place this burden upon the EEOC to show that the legislative history clearly exempted it. This is reinforced by the analysis of Mr. Bumpass, who notes that Congress added a subsection to §706 in 1972 which specifically amended Rule 53 of the Federal Rules of Civil Procedure with regard to the appointment of a special master to handle Title VII actions.[17]

> This congressional action is of great significance to the rule 23 issue because it demonstrates that Congress contemplated that the Federal Rules would apply to EEOC actions, as well as to other civil rights actions. Moreover, Congress deemed it necessary to qualify the application of the provisions of one of the rules to title VII actions. It can only be concluded that had Congress intended that rule 23 not apply to Commission suits, it would have taken similar action with respect to rule 23.[18]
>
> ° ° ° °
>
> It is reasonable to presume that Congress was aware, at the time the 1972 amendments were drafted, of the general applicability of the Federal Rules of Civil Procedures to all civil actions. . . .
>
> Finally, as was pointed out earlier with respect to the application of rule 53 to Commission actions and as was noted by the court in *Holmes*, Congress certainly knows how to establish exemptions from the Federal Rules. It did not do so with respect to the application of rule 23 to section 706 actions brought by the Commission. It is, therefore, reasonable to conclude, for this reason as well as the others discussed previously, that Congress intended that rule 23 would apply to such actions.[19]

17. Bumpass, *supra* note 3, at 360-62.

18. *Id.* at 362.

19. *Id.* at 364, 366.

In concluding this section, GTNW contends that a review of the legislative history of the 1972 amendments to Title VII confirms the following: the court enforcement procedure by the EEOC was adopted to ensure procedural fairness to employers, under the established rules of civil procedure; the comments by the respective Congressmen suggest that they believed Rule 23 would apply to EEOC actions under §706; Congress was aware of the general applicability of the federal rules to all civil actions, and knew how to make specific exceptions, which it did for Rule 53. Therefore, it must be concluded that Congress intended that actions by the EEOC under §706 would be governed by Rule 23 when brought on behalf of a class.

4. The Applicability and Desirability of Applying Rule 23 to EEOC Actions

The EEOC has argued in this case, and in most of the others, that it cannot comply with the requirements of Rule 23. In reviewing Rule 23, the Ninth Circuit concluded that a class did exist. *General Telephone, supra,* 599 F.2d at 327 (Pet. App. A-10). The Ninth Circuit then recognized that Title VII gave the EEOC "standing to sue" and stated that the "legislative history makes it clear that the EEOC is a 'properly suing party'." *Id.* at 327-28 (Pet. App. A-11). But then the Ninth Circuit decided that the purpose of an EEOC suit was "to vindicate public interest," *id.* at 328 (Pet. App. A-12), and therefore the EEOC could not satisfy the requirement of Rule 23(a)(3).[20] GTNW contends the Ninth Circuit erred in this regard.

"[T]he Government vindicates some congressional policy whenever it sues." *Holmes, supra,* 556 F.2d at 792 n.7. That same public policy, however, is vindicated by §706

20. Rule 23 is set forth in Pet. App. at A-41 to A-43.

suits commenced by private litigants, *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). In fact, this Court has recognized the public interest in Title VII actions by private plaintiffs, characterizing them as "acting as 'private attorneys general'", and awarding them attorneys' fees accordingly when successful. *Albemarle Paper Company v. Moody,* 422 U.S. 405, 415, 95 S. Ct. 2362, 2370, 45 L. Ed. 2d 280 (1975). *See also Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 417, 98 S. Ct. 694, 698, 54 L. Ed. 2d 648, 654 (1978). Moreover, §706 actions by private litigants must comply with Rule 23. *East Texas Motor Freight System Inc. v. Rodriguez, supra.* Since a §706 suit, whether brought by the government or by private litigants, inevitably vindicates the public interest, it is difficult to ascertain an adequate rationale for using the "public interest vs. private interest" distinction as a basis for exempting the EEOC from compliance with Rule 23 while requiring the compliance of private litigants. *Holmes, supra,* 556 F.2d at 792 n. 7. This is particularly true where the EEOC suit clearly seeks the same relief the individual claimants would request if they were suing on their own.

The Court has addressed this particular issue in the analysis employed by Mr. Justice Rehnquist, joined by Chief Justice Burger, in the dissent in *Occidental Life Ins. Co. of Cal. v. EEOC,* 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977). In the dissenters' opinion, EEOC suits brought under §706 were actions primarily designed to redress injuries suffered by individual claimants. To the extent that a Congressional policy was vindicated by such suits, the dissenters observed that the public interest was always vindicated by government suits. If the EEOC had not

sued on behalf of the individual claimants, they would have been entitled under §706 to initiate legal proceedings on their own. Thus, according to the dissent, the EEOC placed itself in the shoes of the individual claimants and, having chosen that stance from which to commence the litigation, the EEOC should be required to comply with the same procedural rules that the individual claimants must follow if they had sued on their own. *Id.*, 432 U.S. at 381, 97 S. Ct. at 2462, 53 L. Ed. at 421.

Although the majority of this Court in *Occidental Life* did not address the dissent's characterization of the role of the EEOC in §706 suits, neither did the majority dispute the dissent's analysis. GTNW contends that the analysis by the dissent in *Occidental Life* regarding compliance by the EEOC with the same procedural rules as private litigants should be adopted by this Court.

It is not uncommon for parties who are not technically class members to be permitted to serve as Rule 23 representatives. For example, Rule 23 class actions have been brought by associations,[21] unions[22], and others[23]. In a recent decision by the Ninth Circuit, it held (reversing the district court) that a union could bring a Rule 23 action under Title VII, explaining:

> It is now clear that unions may maintain actions

21. *Arkansas Educ. Assn. v. Board of Educ.*, 446 F.2d 763 (8th Cir. 1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Smith v. Board of Education*, 365 F.2d 770 (8th Cir. 1966); *Thompson v. Board of Educ.*, 71 F.R.D. 398 (W.D. Mich. 1976). *See also Hunt v. Washington State Apple Advertising Comm.*, 423 U.S. 333, 97 S. Ct. 2434, 53 L.Ed. 2d 383 (1977).

22. *Social Services Union v. County*, .. F.2d .., 21 Fair Empl. Prac. Cas. 684 (9th Cir. 1979); *Int'l Woodworkers v. Georgia-Pacific Corp.*, 568 F.2d 64, 67 (8th Cir. 1977). GTNW does not concur with these decisions, permitting the unions to proceed §706, but the incongruity in the Ninth Circuit applying Rule 23 to unions and not the EEOC is obvious.

23. See generally the discussion and authorities in Comment, 46 U. Chi. L. Rev. 690, *supra* note 3, at 712.

> under Title VII on behalf of their members. Indeed, "policy considerations weigh strongly in favor of affording standing to unions which file suit to end discriminatory employment practices. The financial backing and legal expertise that unions can provide would materially advance the type of private enforcement essential to the effectiveness of Title VII."

Social Services Union v. County, supra note 22, 21 Fair Empl. Prac. Cas. at 685.

Prior to 1972 the EEOC could not bring actions on its own, but it now can do so and with its expertise, resources and stature it has increased the effectiveness of Title VII actions, similar to the reasons set forth above as to why unions should be permitted to sue under Title VII for their members. But it becomes a complete anomaly in the law if, to use our facts as an example, the four charging parties would have to comply with Rule 23 if they filed a §706 class action based upon their charges, and their union would have to comply, but the EEOC, seeking identical relief and unable to file the action without the four charges, does not have to comply with Rule 23. The legislative history supports the conclusion that Congress intended the EEOC to be governed by Rule 23.

Since Congress gave the EEOC standing to sue, it is a real party in interest ("a properly suing party", said Senator Javits) and thus for the purposes of Rule 23 it should be considered a member of the class under 23(a).[24] The position of the Ninth Circuit in this regard is unclear. It recognized that the EEOC was a properly suing party, and then it stated "that the EEOC is an adequate representative of victims of employment discrimination," 599 F.2d at 328

24. *Holmes, supra*, 556 F.2d at 796-97; *EEOC v. Page Eng'r. Co., supra* note 3, 17 Fair Empl. Prac. Cas. at 1640.

(Pet. App. A-12), and that the "Rule 23(a) certification requirement has been satisfied [by the EEOC]" 599 F.2d at 333 (Pet. App. A-21). But the Ninth Circuit then suggested that rather than requiring the EEOC to comply with Rule 23, the court could exercise its broad equitable powers under §706(g) of Title VII, 599 F.2d at 334 (Pet. App. A-23), a conclusion which seemed inconsistent with its earlier statements. By so concluding the Ninth Circuit disregarded the reasons why Rule 23 was adopted initially, as will be discussed later.

The EEOC argued below that it cannot comply with the literal membership language of Rule 23(a), although the Ninth Circuit concluded otherwise, and contended there may be such conflicts between its position and that of the prospective classmembers that it could not meet the requirements of Rule 23(a)(4). This latter argument was circular in form as no specific conflicts were identified, and the conclusion was presumed just because the statement was made. But such conflicts, if they arise, may be no greater in degree than those between the named plaintiffs in a private action and the other class members. Furthermore, any conflicts are more theoretical than actual because both in private actions and in EEOC suits under §706 there is a request for back pay. Whether this request is because of the desire for restitution (aggrieved parties) or because of deterrence (EEOC), the effect is the same.

> The interests of the representative and the members of the class need not be identical; they need only share common objectives and legal or factual positions. Moreover, the interests of the representative may go beyond those of the class without being in conflict with those of the class.
>
> The main consideration in determining the adequacy of representation under rule 23(a)(4) is the forthrightness and vigor with which the representative of the class can be expected to defend the interests of the members of the class. While the EEOC may be concerned with protecting the public interest when it brings a section 706 action seeking back pay for aggrieved individuals, that motive does not prevent it from representing aggrieved individuals with the requisite forthrightness and vigor.

Bumpass, *supra* note 3, at 375.

The EEOC also argued it could not satisfy Rule 23(a)(1) as to numerosity. This is a flexible requirement, but GTNW suggests the EEOC should be required to comply with it and it can do so. At some point it must establish the size of the class on whose behalf it is seeking relief. *See Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). If it is not sufficiently numerous to justify a class action, or if the EEOC cannot otherwise satisfy Rule 23, the EEOC should be permitted to represent only those individuals who have filed the charges on which the action is based, without joinder, in accordance with Rule 17(a).[25]

The EEOC has further contended it cannot satisfy Rule 23(a)(3) as to typicality, suggesting it might be restricted to asserting claims similar to those of the parties upon whose charges the action is based. [26] In the court below, it relied upon those cases from the Ninth Circuit discussing the "public policy" vindicated by the EEOC. *EEOC v.*

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25. Fed. R. Civ. P. 17(a) provides that "a party authorized by statute may sue in his own name without joining him for whose benefit the action is brought . . . ." See also the discussion in Bumpass, *supra* note 3, at 377-80, although GTNW is not in total agreement with the author's recommendation in this regard.

26. Petition for Certiorari at 14, *EEOC v. D. H. Holmes Co.*, 436 U.S. 962 (1978) (*cert. denied*).

Occidental Life Ins. Co. of Cal., 535 F.2d 533, 542 (9th Cir. 1976), and *EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976). Those cases, however, referred to "public policy" as a basis for expanding the scope of the *standing* of the EEOC to bring suit for all discriminatory practices discovered during a reasonable investigation. Assuming, *arguendo*, the appropriateness of this position, the EEOC still should be required to comply with Rule 23(a)(3), and the claims should be typical of those of the charging parties *and* others for whom the EEOC has standing to bring suit, i.e., other types of claims discovered during a reasonable investigation.[27] The EEOC should not, however, be permitted to bring broad-based class action suits beyond those typical of the charging parties or those discovered during the investigation, and then seek to buttress these claims by the ensuing discovery during the actual lawsuit.[28]

5. The Problems In Failing to Require That Rule 23 Apply to EEOC Actions Under §706

While GTNW believes the above history and argument adequately sets forth reasons why this Court should conclude that Rule 23 applies to actions by the EEOC, there are many policy reasons in this regard too.

It has been held among the lower courts that neither a settlement nor a decision in an EEOC action is binding

27. See Bumpass, *supra* note 3, at 380-82.

28. In our experience the EEOC has greatly contributed to its own backlog of cases by trying to make a "federal case" out of many individual charges. Typically a charging party's complaint will be re-written by the EEOC investigator to allege class-wide discrimination, although that may not coincide with the actual desires of the charging party. The result is that the employer will refuse to conciliate on a class-wide basis, delaying matters considerably, when the individual charge could have been quickly resolved.

upon the individual employees, even if they were members of the class on whose behalf the EEOC sued.[29] The result could be the subsequent litigation of the same facts and issues in different forums with different results, which is an absolute waste of the resources of both litigants and the courts. [30] As the Fifth Circuit stated in *Holmes*:

> It scarcely needs to be added that Fed. R. Civ. P. 23 also furthers several other important interests. It helps prevent piecemeal suits, saving time and expense. It permits wide scale relief, often encouraging people with small claims to come forward. At the same time, it affords the defendant a measure of protection against inconsistent adjudications and it es-

29. *Roman v. ESB Inc.*, 550 F.2d 1343 (4th Cir. 1976); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 845 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 65, (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395, 97 S. Ct. 1891, 52 L.Ed.2d 453 (1977); *Williamson v. Bethlehem Steel Corporation*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 913 (1973); and *EEOC v. Delaware Trust Co., supra* note 3. The decision is binding, however, upon the aggrieved individuals upon whose charges the EEOC initiated the suit.

30. *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978). *See also Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), *EEOC v. Delaware Trust, supra* note 3, and Fed. R. Civ. P., Adv. Comm. Notes, 39 F.R.D. 69, 91 (1966). This is not just a theoretical possibility in the present case either as the four charging parties are in Beaverton, Oregon and similar charges have been filed with the Oregon Bureau of Labor, Civil Rights Division, and it is suggesting it will soon bring a similar class action, which will duplicate many of the legal and factual issues herein. In addition, numerous lawsuits have arisen as a result of the American Telephone and Telegraph consent decree with the EEOC. *EEOC v. AT&T*, Civ. No. 73-149 (E.D. Pa., filed Jan. 18, 1973), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE (P. Wallace ed. 1976). The union intervened in the action and appealed the adverse effects upon its union agreements, albeit unsuccessfully, but this still caused the litigation to drag on for several more years. *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Many others also contested the consent decree. *See, e.g., Walker v. Southwestern Bell Tel. Co.*, 18 Fair Empl. Prac. Cas. 1784 (N.D. Tex. 1978); *Garnett v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1773 (D. Colo. 1978); *Peals v. Southwestern Bell Tel. Co.*, 18 Fair Empl. Prac. Cas. 1781 (D. Kan. 1977); *Butera v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1779 (D. Colo. 1977); *LaCombe v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1774 (D. Colo. 1977).

> tablished a degree of judicial control to check possible abuse of the class device. All of these interests remain compelling regardless of the identity of the plaintiff. We certainly do not see why EEOC, in particular, presents a special case. If EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question.

556 F.2d at 795-96.

As the *Holmes* court noted, certification of classes under Rule 23 will provide clear definition to the action, adequately notify defendants of adverse interests and will make discovery more effective and pretrial identification of the issues more feasible. At the present time in this action the charges were filed by four women working at the Beaverton, Oregon facility (R. 24, 27). This is one facility out of 116, one state out of five, and four employees out of over 5000 (R. 114-27). In the normal situation, had the action been brought by the four individual charging parties, GTNW could have obtained definition of the class and would have known the appropriate limits for which discovery would be required, such as either that facility or the facilities in that division, or maybe even the facilities in that state. As it stands, however, the EEOC maintains it can have discovery for the entire company—all facilities, all states, and all employees. Objections as to improper discovery are difficult because there is no class definition or limits of any type on the action.[31] In the usual case classes are defined and limits imposed. Many employers have over 100,000 employees. A multi-state employer with several large facilities, under such an action by EEOC, would have

31. For a discussion of the problems of permitting broad, undefined discovery (such as the EEOC seeks in these undefined class actions), see authorities cited in *Carter Carburetor v. EEOC*, .. U.S. .., 99 S. Ct. 865, 868-69, 59 L.Ed.2d 52 (1979) (Mr. Justice Powell, dissenting from denial of certiorari).

an unbelievably burdensome task in seeking to comply with discovery without an adequate class definition, as GTNW is experiencing at the present.

There were many well-advanced reasons for the adoption of Rule 23 initially. The 1966 Committee Note to Rule 23 indicates that the rule was specifically intended to apply to situations such as those in the present case,[32] and in particular this applies to civil rights cases.[33]

The *Proposed Amendments to Rules of Civil Procedure for the United States District Courts, supra* note 32, regarding the amendment which eventually became the present Rule 23, stated:

> Illustrative [of the kind of actions which would fall under proposed Rule 23(b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

GTNW contends that since it was obvious when the drafters prepared Rule 23(b)(2) that it was expressly enacted to cover civil rights suits, it only follows that Congress would have specifically mentioned that Rule 23 did not apply to civil rights suits commenced by the EEOC, at the time of the 1972 amendments, if it had so intended. Lack of such expression confirms that Congress did not intend to exempt the EEOC from Rule 23.

There are many benefits which Rule 23 would provide to EEOC actions. The *res judicata* effect of a decision, and

32. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 100-01 (1966). *See also* 3B Moore's Federal Practice ¶23.02 [1], at 23-25 (2d ed. 1979).

33. 3B Moore's Federal Practice, *supra* note 32, ¶23.02 [2.-6], at 23-50 to 23-53. *See also Pearson v. Townsend*, 326 F. Supp. 202, 211 (D. S.C. 1973).

the elimination of the risk of multiple lawsuits, is of paramount importance and is essential to ensure procedural fairness for the defendant employer. If the employer is going to be bound to the class if he loses, it is only fair that the class be bound by the decision if the employer prevails.[34] It is no more unfair to hold class members bound by an EEOC suit than it is to have them bound by a suit of the same scope but brought by private individuals.

Another important benefit of Rule 23 is that it binds class members to a settlement, as well as to an adjudication, and assists in eliminating subsequent lawsuits.[35] It also permits better judicial control of the proceedings in general and settlement, particularly through its Rule 23(d) powers. (See Pet. App. A-43.)

Possible prejudice exists as to potential class members too by the failure to require the EEOC to comply with Rule 23. The EEOC frequently develops and changes the scope and benefits of its lawsuit, as it desires, throughout the course of its action when there is no early determination of a class.[36] Potential class members may rely upon the

34. See *EEOC v. Datapoint, EEOC v. Delaware Trust* and *EEOC v. Page Eng'r, supra* note 3.

35. *See* notes 29 & 30 *supra* for a list of cases involving subsequent suits after class litigation without the benefits of Rule 23. *See also* Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 Duke L.J. 163, 207 n. 136. The only aggrieved individuals bound in a §706 suit are those upon whose charges the EEOC based the action, and literally hundreds of charges may be pending against large employers, although only four (as here) may be used as the basis for the suit. During fiscal year 1974 the EEOC said at least 3184 charges were pending against five nation-wide employers—an average of 636 each. COMPTROLLER GENERAL, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION (1976).

36. See discussion of EEOC procedures in *EEOC v. Delaware Trust Co., supra* note 3.

EEOC action only to discover it fails to provide the relief they desire, and they cannot bring their own class actions but they are limited to the back pay relief obtained by the EEOC,[37] or at least they have waited so long that their relief is limited by §706(e).

The above discussion more than adequately demonstrates than Rule 23 can, and should, be applied to EEOC suits under §706.

The Ninth Circuit did recognize that problems would be encountered because of a failure to comply with Rule 23, but sought to parry them by suggesting that the courts rely upon their equitable powers under §706(g) of Title VII. *General Telephone, supra,* 599 F.2d at 344-35 (Pet. App. A-24). GTNW contends that this return to the pre-1966 amendments to the federal rules completely overlooks the reasons behind the enactment of Rule 23.[38] The Ninth Circuit also misconstrued the purpose of §706(g)—it is to assist in ensuring that aggrieved individuals achieve their "rightful place" (substantive relief) in situations where a simple award of damages would be inadequate; its purpose is not to permit circumvention of the Federal Rules of Civil Procedure.

The Court's decision in *Franks v. Bowman*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 444 (1976), discussed equitable relief under §706(g). Mr. Justice Brennan noted that its purpose was to grant broad equitable discretion to "make whole" the individual claimants, i.e., assist them to achieve their rightful place when damages would be inadequate because there existed a "continuing effect" of past discrimi-

37. *See, e.g., Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73 (E.D. Mich. 1975); *Franklin v. General Electric Co.*, 15 Fair Empl. Prac. Cas. 1085 (W.D. Va. 1975); and the AT&T cases cited in note 30 *supra*.

38. See notes 32 & 33 *supra*.

nation. 424 U.S. at 763-64, 96 S. Ct. at 1264. There was no suggestion that the purpose of §706(g) was to develop alternatives to Rule 23. A similar interpretation was acknowledged by Justice Stewart in *Teamsters v. United States, supra,* 431 U.S. at 364, 97 S. Ct. at 1869. If flexibility is needed in handling the class, Rule 23 itself is more than adequate.

6. The Relationship Between §707 and §706

The Ninth Circuit, relying somewhat upon the magistrate's report and recommendation, concluded that there was no difference between §707, pattern or practice actions, and §706 after the 1972 amendments. 599 F.2d at 333 (Pet. App. A-21). There are, however, differences in the sections both in the statute and as treated by the EEOC itself. At the present time the EEOC uses §707 to eliminate broad systematic discrimination, as opposed to individual claims under §706. The Chair of the EEOC, Eleanor Norton Holmes, appeared before the House Committee on Employment Opportunities on July 27, 1977 to outline her plan for a total redesign of the Commission and its functions. Point No. 5 concerned establishing a new program to deal with systemic discrimination. A new "Systemic Division" was subsequently created to deal with patterns and practices of discrimination for major employers. On March 29, 1978 the EEOC announced the criteria which the Systemic Division would use in selecting companies for major pattern and practice cases.[39]

In the petition for certiorari filed with this Court by the EEOC in the *Holmes* case, the Commission continued to

39. CCH Employment Practices Guide ¶5062.

maintain that a distinction existed between §706 and §707.[40]

Regardless of whether §707 and §706 are similar, or identical, or dissimilar, the fact remains that prior to 1972 the issue had never been raised as to whether Rule 23 applied to §707 actions.[41] Moreover, before 1972 §707 actions did differ from §706 actions. Some commentators have argued, however, that Rule 23 should be applied to §707 for the same reasons it should be applied to §706; it will serve the same purposes and will impose no more in the way of restrictions other than are necessary to ensure fairness for all the parties, to include employers.[42] Conceivably, however, differences may continue to exist between §707 and §706: a Commissioner's charge may prompt a §707 suit, but not a §706 suit; a class action may be appropriate under §706 because it concerns a sufficiently large number of employees at one facility, out of many, for

40. *EEOC v. D. H. Holmes,* Petition for Cert, *supra* note 26, at 19, which stated:

> The Commission has traditionally used Section 706 as the appropriate enforcement device in cases in which charging parties have filed complaints with the Commission. Section 707 is reserved for more serious cases involving systemic discrimination and initiated by a Commissioner's charge. See EEOC Guidelines, BNA Daily Labor Report, March 22, 1978, p. A-6.

41. The first circuit case to even hold that back pay was an available remedy under §707 was *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973), a decision rendered *after* the 1972 amendments to Title VII. Since it most frequently is the question of back pay which prompts the inquiry as to the *res judicata* effect of such a judgment, it becomes more understandable why the Rule 23 issue as to §707 was never raised prior to 1972. Before 1972 the Attorney General had primarily sought injunctive relief under §707, without back pay. *See Developments in the Law—Title VII,* 84 Harv. L. Rev. 1109, 1243 (1971).

42. See generally the discussion in Bumpass, *supra* note 3, at 390-94, and Comment, 46 U. Chi. L. Rev., *supra* note 3, at 693-96. Note also, however, that in the §707 action in *Teamsters v. United States, supra,* the district court did create classes and sub-classes in a procedure similar to that required by Rule 23.

a large employer, but there is no pattern or practice as the standard operating procedure (systemic discrimination) throughout the company which will justify a §707 action; and the EEOC may use §707 primarily for broad-ranging prospective relief or injunctive relief (as it primarily did before 1972) without seeking back pay and related benefits for individual employees, as it would be required to do under §706, and therefore avoiding the necessity of complying with Rule 23. Whether this Court reaches these issues or not, it remains apparent that Rule 23 should be held to apply to §706 actions by the EEOC.

CONCLUSION

The Federal Rules of Civil Procedure are to apply to all civil actions, unless otherwise exempted. There is no specific exemption for Rule 23 either in the rules or by statute. A close scrutiny of the legislative history fails to support the conclusion that Congress intended to exempt actions by the EEOC from Rule 23, and implied repeals, particularly with the dearth of support therefor, are to be rejected.

There are many advantages to applying Rule 23 to actions brought by the EEOC, the same as there are advantages in applying it to other actions filed by individual claimants. These include *res judicata* effect upon class-members, certainty and predictability, more effective discovery, identification of adverse interests, better judicial control, and fairness to all the parties, including the employers. There is an elimination of multiple litigation with Rule 23.

For all of the above reasons GTNW urges this Court to

hold that Rule 23 applies to §706 actions brought by the EEOC.

Dated this 24th day of January, 1980.

Respectfully submitted,

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